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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

31440

WILLIAM H. KILLOREN, Trustee in Bankruptcy of Hamilton-Brown Shoe Company, a Corporation, Bankrupt, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

No. 195

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

LON O. HOCKER,
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PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of William H. Killoren, Trustee in Bankruptcy of Hamilton-Brown Shoe Company, a corporation, Bankrupt, respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

On April 19, 1939, the Hamilton-Brown Shoe Company filed its petition for a corporate reorganization under the provisions of Chapter X of the Bankruptcy Act (R. 10, 21).

James K. Vardaman and John W. Lake were appointed co-trustees and operated the business for a period of time, but on June 22, 1939, an order of adjudication was filed (R. 10, 21), and on July 7, 1939, William H. Killoren, petitioner here, was appointed Trustee in Bankruptcy for the purpose of liquidating and distributing the estate (R. 3).

Between April 19, 1939, and July 7, 1939, Vardaman and Lake, while acting as co-trustees, became indebted to the United States on account of taxes which had accrued during that period. These taxes, among other costs of administration involved during the same period, remain unpaid (R. 5, 10).

On February 29, 1940, after a hearing on the Trustee's petition for an order respecting the distribution and priority of payment, the Referee in Bankruptcy entered an order providing that the claims against the bankrupt estate's Trustee be classified and distribution be made by the Trustee out of funds in hand as follows (R. 7):

> "1. Claims allowed as trust funds in the hands of the trustee, and property held subject to reclamation petitions.
>
> "2. Fees and expenses allowed or to be allowed, and costs incurred, in the administration of this estate before the Referee in Bankruptcy, including Referee's fees and costs, fees and expenses allowed or to be allowed to William H. Killoren, trustee, fees and expenses allowed or to be allowed to the attorneys for the trustee, and any other fees, costs of court or administration that may be allowed in the regular bankruptcy proceedings.
>
> "3. All claims allowed or to be allowed as preferred as a result of operation of the business of the bankrupt subsequent to the filing of the petition for corporate reorganization in these proceedings, including on a parity all such claims for that period of operation (beginning with the filing of the petition for corporate

reorganization up to the time that William H. Killoren as trustee took charge of the assets), including tax, wage, merchandise, and service claims, and including allowances made by the United States District Judge for fees and expenses of the trustees appointed by him, of counsel for the bankrupt, and of counsel for the creditors' committee: it being intended hereby to include in this class all obligations incurred during the corporate reorganization proceedings in this estate and up to the time William H. Killoren as trustee in bankruptcy took charge of the assets.

"4. Claims allowed or to be allowed as preferred prior to the reorganization proceedings in this cause, and such claims shall be subject to further classification, distribution to be made as provided by Section 64 of the Bankruptcy Act of 1898, as amended.

"5. General claims against the estate."

A petition for review of this order was filed in the District Court for the Eastern District of Missouri, but the Government's petition was denied and the order of the Referee was confirmed (R. 9, 14).

The Government contended that its claim for taxes, incurred as a result of the operation of the business of the bankrupt subsequent to the filing of the petition for corporate reorganization, and accordingly classified in paragraph 3 of the Referee's order, should be on a parity with the costs of administration included in paragraph 2 of the Referee's order, i. e., that all costs of administration, whether incurred during the operation of the business of the bankrupt by the operating co-trustees or in connection with the liquidation in the so-called "regular bankruptcy proceedings," should be pari passu.

The Circuit Court of Appeals reversed the order of the District Court (R. 21) with directions to accord to the tax claim of the United States the parity claimed by it. The

effect of this decision is to eliminate the distinction made by the Referee between Class 2 and Class 3 claims. In due course petitioner filed his motion for rehearing, which was denied by the Court on May 20, 1941 (R. 31).

BASIS OF THE JURISDICTION OF THIS COURT.

Jurisdiction is claimed under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (see Title 28, U. S. C. A., Section 347).

An interpretation is sought of the Bankruptcy Act (Act of July 1, 1898, c. 541, 30 Stat. 544) as amended, and in particular of the Amendatory Act of 1938, known as the Chandler Act (Act of June 22, 1938, c. 575, 52 Stat. 840). Section 64 (a) thereof (Title 11, U. S. C. A., Section 104) relates to the subject of priority of debts in liquidation in bankruptcy proceedings, and provides in part that:

> "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; * * * the costs and expenses of administration, * * *."
>
> (Subsections 2 to 5, inclusive, relate to wages, expenses of creditors in obtaining a refusal or revocation of the confirmation of debtor's plans, taxes, and certain other debts entitled to priority; such provisions are not involved here.)

Section 238 of the Chandler Act (Title 11, U. S. C. A., Section 638), a section of Chapter X thereof, provides in part that:

> "Upon the entry of an order directing that bankruptcy be proceeded with—
>
> "(1) Where the petition was filed under Section 127 of this Act, the bankruptcy proceeding shall be

deemed reinstated * * *; or where the petition was filed under Section 128 of this Act, the proceeding shall thereafter be conducted, so far as possible, in the same manner and with like effect as if an involuntary petition for adjudication had been filed at the time when the petition under this chapter was filed, and a decree of adjudication had been entered at the time when the petition under this chapter was approved."

(Subsections 2 and 3 are not involved here.)

The judgment of the Circuit Court of Appeals, Eighth Circuit, was entered April 30, 1941 (R. 25); the petition for rehearing was denied May 20, 1941 (R. 31); thirty days stay of mandate was granted May 29, 1941 (R. 31).

THE QUESTION PRESENTED.

The question presented is whether, after an order of adjudication in a Chapter X proceeding, the Bankruptcy Court, in making an order of distribution, is required by Section 64 (a) of the Bankruptcy Act to treat all costs of administration upon a parity, or whether the Court, either under its equity power or under the provisions of Section 238 of the Act, or both, may order first paid those expenses necessarily incurred in the liquidation of the estate. Or in other words, in such a situation, are the provisions of Section 64 (a) to be applied absolutely and without flexibility, and is no effect to be given to the provisions of Section 238 of the Act, and to the wording thereof which seems to require that such provisions as are contained in Section 64 (a) control, not absolutely, but "so far as possible."

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals has decided an important question of Federal law which has not been, and should be, settled by this Court.

2. The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

There have been orders similar to the order entered by the Referee in this case entered in more than a score of other cases in the Eastern District of Missouri alone. A similar order was entered in the Western District in a case involving a very substantial amount; counsel in that case appeared by leave as counsel for amicus curiae in these proceedings (R. 19). The same question must necessarily arise in every case where the facts are similar to the situation before us here, i. e., where there has been an unsuccessful attempt to operate under Chapter X of the Bankruptcy Act, followed by an order directing that bankruptcy be proceeded with, and where the assets upon liquidation are found insufficient to pay in full all costs of administration, including those incurred prior to the said order.

PRAYER.

For the foregoing reasons, which are developed in further detail in the accompanying brief, your petitioner prays that a writ of certiorari issue out of this Court to the Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court, on a day to be determined, a full and complete transcript of the record of all the proceedings of such Court had in this cause, to the end that this cause may be reviewed and determined by this Court; that the final order and decree of

the Circuit Court of Appeals for the Eighth Circuit be reversed, and that the petitioner be granted such other and further relief as is proper.

WILLIAM H. KILLOREN,
Trustee in Bankruptcy of Hamilton-Brown Shoe Company, a Corporation, Bankrupt,
Petitioner,

By LON O. HOCKER,
HARRY S. GLEICK,
Counsel for Petitioner.